FILED
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-5064

MATTHEW O. REILLY,

Petitioner,

against

CAULDWELL-WINGATE COMPANY, INC., BERNARD J. ROSEN and MAX STAHL,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 21, 1972

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Respondents, Cauldwell-Wingate Company, Inc. and Bernard Rosen submit this brief in opposition to the petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit dated April 6, 1972, affirming without opinion the granting of summary judgment to the respondents dismissing the complaint. Max Stahl, named as a respondent, died before the commencement of the action.

Counterstatement of Questions Presented

1. Whether this action is barred under the doctrine of *res judicata.*

2. Whether this action is barred by limitation of time.

3. Does the complaint fail to state a claim on which relief can be granted?

Counterstatement of the Case

The facts are fully and clearly set forth in the opinion of Judge Inzer B. Wyatt (App. 17-28) and need not be repeated. It may be noted, as Judge Wyatt has pointed out, that petitioner instituted a prior lawsuit against respondents Cauldwell-Wingate Company, Inc. and Bernard Rosen in which a stipulation was made by petitioner, his counsel, and counsel for those defendants dismissing the complaint on the merits. Judgment was accordingly entered on that stipulation for the defendants, which was affirmed on appeal, unanimously, from the Bench (App. 24-25).

In the present action, Judge Wyatt granted summary judgment for the respondents (1) on the merits, (2) because the claimed agreement would be void as against public policy and (3) because there is no genuine issue as to any material fact (App. 27).

The Court of Appeals affirmed unanimously without opinion (R. App. 1).

ARGUMENT

I

This action is barred under the doctrine of *res judicata*.

The claims asserted in this action were dismissed on the merits in the prior action against respondents Cauldwell-Wingate and Rosen (65 Civ. 213). The stipulation of all the parties in that action dismissed the complaint on the merits without prejudice to appellant's right to appeal from the order denying his motion to amend the complaint. On appeal, that order was unanimously affirmed from the Bench.

The facts in that action are the same as those pleaded by the appellant in this action, which Judge Wyatt clearly pointed out. Consequently, he properly held, and the Court of Appeals affirmed, that this action is barred under the doctrine of *res judicata*.

> "There is no doubt that a judgment entered upon a settlement is res judicata as to all questions which were or could have been litigated in the action in which the settlement was entered." *Stuyvesant Insurance Co.* v. *Dean Construction Co.*, 254 F Supp 102, 110 (S.D.N.Y. 1966) aff'd on opin. below, 382 F 2d 991 (CA 2, 1967).

Appellant's petition erroneously states there is an inter-circuit conflict with the decision herein, which was affirmed by the Court of Appeals for the Second Circuit, and that Court's own decision in *Roloff* v. *Arabian American Oil Company*, 421 F 2d 240 (CA 2, 1970). Perhaps he means

an "intra-circuit" conflict. In any event, there is no such conflict because *Roloff* is inapplicable. In *Roloff*—

1. There was no stipulation of dismissal on the merits for the purpose of taking an appeal. The trial court dismissed the second count of the complaint on substantive grounds and the plaintiff moved to dismiss the remainder of the complaint so he could appeal the dismissal of the second count.

2. It was the defendant which in effect was allowed to amend its answer on its motion for summary judgment, not the plaintiff.

Roloff has nothing to do with this case. Appellant cannot rely on it, nor can he argue that he is being deprived of his day in court. As Judges Weinfeld and Wyatt both pointed out, appellant has already had that opportunity.

II

This action is barred by limitation of time.

Under the New York statute, CPLR §§203 and 213, an action upon a contractual obligation or liability express or implied, except as provided in Article 2 of the Uniform Comercial Code, must be commenced within six years after the cause of action has accrued. A cause of action "accrues" at the "time when the plaintiff first became enable to maintain the particular action in question." (*Cary* v. *Koerner*, 200 N.Y. 253, 259).

This action was commenced December 10, 1970. The last payment made to Cauldwell-Wingate, for which appellant

claims a share, was made on November 9, 1964. The action, therefore, was not timely instituted (App. 26).

Appellant attempts to convert an action for alleged breach of contract into one for conspiracy to defraud, in an effort to circumvent the statute of limitations. The essence of his action, however, is contract. A similar effort was rejected by a New York court in *Wolf* v. *Glazer,* 17 Misc. 2d 522, 523, which stated:

> "* * *. The fraud alleged constitutes, at most, fraud in the performance of the contract. Under such pleadings a cause of action is alleged only for breach of contract * * * (citations omitted). The cause of action such as is alleged in the complaint herein arises not upon discovery of the facts constituting the breach of contract, but upon the happening of the breach itself. (citing cases)."

III

The complaint fails to state a claim on which relief can be granted.

Appellant has not seen fit to include his complaint in his Appendix. However, Judge Wyatt's opinion points out that the complaint is insufficient as a matter both of substantive and procedural law (App. 27). Appellant's lengthy recital of Federal Regulations emphasizes the invalidity of any agreement to pay a contingent fee. Judge Wyatt found that even if appellant's claimed agreement were specific enough to be enforced, it would be void and appellant could not recover (App. 27).

IV

Appellant has shown no reasons for the granting of the writ.

Appellant has not demonstrated that the judgment of the Court of Appeals for the Second Circuit conflicts with any decision or law or otherwise comes within any of the grounds for granting the writ, which are specified in Rule 19(1)(b) of this Court.

Conclusion

For the foregoing reasons the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

AARON GOODSTEIN
BENJAMIN WM. MEHLMAN
Attorneys for Respondents

Appendix

Judgment of Affirmance of the Court of Appeals for the Second Circuit Dated April 6, 1972

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of April one thousand nine hundred and seventy-two

Present:

Hon. TOM C. CLARK, Associate Justice,
Hon. J. EDWARD LUMBARD, Circuit Judge,
Hon. HAROLD R. TYLER, District Judge.

MATTHEW O. REILLY,

Plaintiff-Appellant,

v.

CAULDWELL-WINGATE COMPANY, INC., a Corporation of the State of New York or one of the other states of the United States, BERNARD J. ROSEN, MAX STAHL and STANLEY STAHL,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. Daniel Fusaro,
Clerk